

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

DAVID HARRIS,

Defendant

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Criminal No. 97-34-P-H
(Civil No. 99-255-P-H)

***RECOMMENDED DECISION ON DEFENDANT-S MOTION
TO REOPEN MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. ' 2255***

David Harris, appearing *pro se*, moves this court to reopen his previously denied 28 U.S.C. ' 2255 motion on the basis that the United States Supreme Court recently announced a new rule of law applicable to his case. Motion To Re-Open 2255 Case as Timely Due to a New Rule of Law Imposed by the Supreme Court ("Motion To Reopen") (Docket No. 31). Inasmuch as the court is without jurisdiction to reopen the old motion and the new motion is in any event frivolous, I recommend that the Motion To Reopen be denied.¹

By order dated November 16, 1999 this court denied the petitioner's Motion Under 28 USC ' 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Section 2255 Motion") (Docket No. 14) on grounds that it had been untimely filed. Order Affirming Recommended Decision of the Magistrate Judge ("Order") (Docket No. 28); Recommended Decision on Defendant's

¹ Harris also filed a motion requesting an opportunity to file a reply brief with respect to the Motion To Reopen. *See* Motion Requesting 14 Days To File His Traverse, etc. (Docket No. 32). Inasmuch as I perceive no need to order the government to answer the Motion To Reopen, no court action is required on the motion seeking leave to file a reply.

Motion for Collateral Relief Under 28 U.S.C. § 2255 (“Recommended Decision”) (Docket No. 24). Although the Section 2255 Motion was denied without prejudice, *see* Order at 1, leaving the door open to the filing of a subsequent petition, the court did not expressly retain jurisdiction over the denied motion. Accordingly, it cannot be reopened. *See, e.g., Lefkowitz v. Fair*, 816 F.2d 17, 21 (1st Cir. 1987) (rejecting argument that denial of habeas petition “without prejudice” tantamount to explicit retention of jurisdiction necessary to permit its reopening).

The Motion To Reopen in any event lacks merit. A motion must be filed pursuant to 28 U.S.C. ' 2255 within one year from the latest of, *inter alia*, “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review” 28 U.S.C. ' 2255.

In the Motion To Reopen, Harris relies on *Castillo v. United States*, 68 U.S.L.W. 4475 (U.S. June 5, 2000), for the proposition that “an underlying charge (in this case, a drug trafficking offense) would need to be present in order to convict on the 924(c).” Motion To Reopen at 3. He seeks “an evidentiary hearing to establish this necessary element of the offense of 924(c)” *Id.* at 5.

Harris pleaded guilty *inter alia* to a charge of use of a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c) and 2. Recommended Decision at 1. Section 924(c)(1), as in effect at the time of the judgment against Harris, provided in relevant part: “Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years” *Id.* at 5 n.3.

The problem for Harris is that *Castillo* has nothing to do with drug-trafficking offenses. It focuses instead on a portion of the statute providing for lengthier sentences if certain weapons (such as

machine guns) are involved. *See Castillo*, 68 U.S.L.W. at 4475-76. That portion, which the Supreme Court holds defines separate crimes rather than providing for enhanced penalties, *see id.*, was not at issue in Harris's case.

For these reasons, I recommend that the Motion To Reopen be denied without an evidentiary hearing or a response from the government.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of June, 2000.

David M. Cohen
United States Magistrate Judge

CLOSED ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-255

HARRIS v. USA

Filed: 08/06/99

Assigned to: JUDGE D. BROCK HORNBLY

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 510

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 28:2255 Motion to Vacate Sentence

DAVID L HARRIS
plaintiff

v.

USA

defendant